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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 174

ERNA CHRISTIANI-ONKEN, a/k/a ERNA CHRISTIANI,
Petitioner

v.

ROBERT F. KENNEDY, Attorney General, and as Successor to the Alien Property Custodian

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN W. PEHLE
JAMES H. MANN
1210 Eighteenth Street, N.W.
Washington 6, D. C.
Counsel for Petitioner

PEHLE, MANN, RIEMER & LUXFORD
1210 Eighteenth Street, N.W.
Washington 6, D. C.
Of Counsel.

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ROBERT F. KENNEDY, Attorney General, and as Successor to the Alien Property Custodian.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Erna Christiani-Onken, also known as Erna Christiani, appellee below, prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-entitled case.

OPINIONS BELOW

The findings of fact and the conclusions of law of the District Court are unreported. They are set forth at pages 27-33 of the certified transcript of the record herein (R. 27-33), and the judgment of that court is set forth at page 34 of the record (R. 34). The opinion

of the Court of Appeals for the District of Columbia Circuit is not yet reported. It is set forth at pages 172-174 of the certified transcript of the record herein (R. 172-174) and in Appendix A hereto (pp. A-1—A-3, *infra*). The judgment of the court is set forth at page 175 of the record and in Appendix B hereto (pp. B-1, *infra*).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit, reversing the District Court, was dated and entered March 15, 1962 (R. 175). Since the *per curiam* opinion decided the case solely on the authority of *N. V. Handelsbureau La Mola* v. *Kennedy*, 299 F. 2d 923 (U.S.C.A.D.C.) Appendix C hereto (pp. C-1—C-7 *infra*), decided February 1, 1962 (R. 172 at 174), no petition for rehearing was filed. The jurisdiction of this Court is invoked under Tit. 28 U.S.C., Secs. 1254(1) and 2101(c).

QUESTIONS PRESENTED

Whether an individual resident within the territory of a neutral nation (Switzerland) at the time of the vesting of her property under the Trading with the Enemy Act, as amended, is an "enemy" within the meaning of Section 2(a) of such Act so as to preclude her from maintaining a suit under Section 9(a) of the Act for the return of her property solely because she had previously resided within the territory of an enemy nation (Germany) with which the United States was at war.

Whether if the Trading with the Enemy Act, as amended, were interpreted to include such a resident of a neutral country within the definition of "enemy",

the Act would come into conflict with the Fifth Amendment to the Constitution of the United States by taking private property for public use without just compensation.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are the Fifth Amendment to the Constitution of the United States, and Sections 2(a) and 9(a) of the Trading with the Enemy Act, 40 Stat. 411 (1917), as amended, 50 U.S.C. App. §§ 2(a) and 9(a) (1958) which are set forth in Appendix E hereto (pp. E-1-E-2, *infra*).

STATEMENT

The jurisdiction of the United States District Court for the District of Columbia was based upon Section 9(a) of the Trading with the Enemy Act, as amended *supra*, (hereinafter sometimes referred to as "the Act"). This is an action to recover certain property vested by the Attorney General under Vesting Orders Nos. 18396 and 18400. The property in question represents petitioner's share of the American estate of her deceased Swiss father and consists of cash and securities which at the time of vesting were held at the Swiss American Corporation and the Guaranty Trust Company of New York, both located in New York City.

Petitioner was born in Switzerland in 1911 of German parents and had German nationality at birth. She and her parents became naturalized Swiss citizens in 1919. In 1931 she married a German citizen and moved to Germany to live with him. By her marriage she acquired German citizenship. In the middle 1930's petitioner, her husband and one child moved to the

little town of Konstanz which is situated astride the German-Swiss border. Another child was born to them there and they lived in the German sector of Konstanz until April of 1946 when petitioner and her two children left Germany and entered Switzerland on a temporary permit. She and the children were subsequently joined there by her husband. Petitioner and her family have continued to reside in Switzerland ever since. At the earliest date possible, namely, 1958, petitioner re-acquired her Swiss citizenship.

After trial, the District Court found that when petitioner left Germany in April of 1946 she intended to leave Germany permanently and when she entered Switzerland she intended to reside there permanently. None of the District Court's findings of fact were disturbed by the court below. The District Court held on the authority of *Willenbrock* v. *Rogers*, 255 F. 2d 236 (3 Cir. 1958) Appendix D hereto (pp. D-1—D-6, *infra*) that petitioner was not an enemy within the definition of Section 2(a) of the Act and therefore was entitled to the return of her property which had been vested by the Attorney General.

The Court of Appeals, *per curiam*, reversed the decision of the District Court on the authority of *N. V. Handelsbureau La Mola* v. *Kennedy, supra*, App. C-1., decided after argument and before the decision of the instant case.* The ground of the decision in the court below is the interpretation of the Act as defining enemy to include any person who had been a resident of enemy territory at any time during the war regardless of his residence at the time of the vesting order.

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* That case is hereinafter referred to as "*La Mola*". A petition for a writ of *certiorari* in that case, No. 907, was filed in this Court on April 26, 1962.

This case raises precisely the same legal questions raised in *Rommel, et al. v. Kennedy*, No. 1023. It was argued with those cases below and the decision of the Court of Appeals was handed down on the same day. For the purpose of petitioning for a writ of *certiorari*, it was not consolidated with the *Rommel, et al.* cases as would be permitted by the provisions of sub-paragraph 5 of Supreme Court Rule 23 for the reason that petitioner only instructed counsel to file a petition for a writ of *certiorari* on the day that the petition in the other cases was sent to the printer.

REASONS FOR GRANTING THE WRIT

Introduction

The *per curiam* opinion below was not without virtual dissent. Chief Judge Miller, concurring only in the result, states:

> "While this case was under submission, my brothers here and a third judge handed down a decision in *N. V. Handelsbureau La Mola* v. *Kennedy*, which had been heard shortly before the hearing of the present appeals. As I did not participate in that case I had no opportunity to protest against the decision rendered. Although I do not agree with it, the *Handelsbureau* opinion is a binding precedent which requires reversal here. For that reason only, I concur in the result of the majority opinion in this case." (R. 174, App. A-3).

In *La Mola* the court held that property of a Netherlands corporation could be vested and confiscated on the ground that the Netherlands had been occupied by the military and naval forces of the enemy, even though the vesting took place on December 15, 1950, several years after the enemy occupation ceased.

The petitioner does not question the authority of the Attorney General (Alien Property Custodian) to vest and retain enemy property after hostilities have ceased but before the war is terminated. She does not question the legality of the vesting of her property, because admittedly, she was a foreign national and, therefore, her property was subject to vesting under Section 5(b) of the Act. But, as this Court held in *Clark v. Uebersee Finanz Korp., A.G.*, 332 U.S. 480 (1947) the Attorney General can vest property that he cannot hold against a 9(a) action brought by a foreign national who is a non-enemy. It is petitioner's contention that at the time of the vesting of her property she, as a resident of neutral Switzerland, was a non-enemy and therefore is entitled to a return of her property in this 9(a) action.

Since, as stated earlier, the legal issues in this case are the same as those in *Rommel, et al.* v. *Kennedy*, No. 1023, the reasons for granting the writ here are the same as in those cases. Accordingly, the contentions made in that petition are incorporated herein by this reference as well as being set forth in summary form below.

I

The decision below is squarely in conflict with the decision of the Third Circuit Court of Appeals in *Willenbrock* v. *Rogers, supra,* App. C-1. In that case two vesting orders had been issued. It appeared from plaintiff's complaint that one had become effective while she was a resident of Germany and the other after she had returned to the United States and taken up residence here. Judge Goodrich, speaking for the court held that in an action under Section 9(a) of the

Act the plaintiff was entitled to recover the property seized by the second vesting order if she could establish that at the time of seizure she was no longer resident within Germany.

Willenbrock is right and *La Mola* is wrong because *Willenbrock* accords with the common law rule and the Congressional intent as shown both by a reading of the Act and its legislative history. Both *Willenbrock* and *La Mola* in arriving at conflicting results cite this Court's opinion in *Swiss Nat. Ins. Co.* v. *Miller*, 267 U.S. 42 (1925). A reading of that case, however, shows that it supports the court in *Willenbrock* and that the court below in *La Mola* seemed to rely principally on a quotation from the case which it read out of its context.

The other authorities which the court cited in *La Mola* to support the result it reached, *Hansen* v. *Brownell*, 18 U.S. App. D.C. 230, 234 F. 2d 606 (1956); *Bank Voor Handel en Scheepvaart, N.V.* v. *Kennedy*, 288 F. 2d 375 (1961), cert. den. 366 U.S. 962; and *Orme* v. *Northern Trust Company*, 410 Ill. 354, 102 N.E. 2d 335 (1951), cert. den. sub nom. *Hardenberg* v. *McGrath*, 343 U.S. 921, (1952), are irrelevant.

Hansen concerned an enemy agent and it was there held that one who by his own free choice commits hostile acts against the United States acquires enduring enemy status for the purpose of the Act. This Court in *Guessefeldt* v. *McGrath*, 342 U.S. 308, 318 (1952) in commenting on *The Venus*, (U.S.) 8 Cranch 253 (1814) noted a distinction between enemy status which follows location and enemy status arising from hostile acts and suggests the enduring quality of the latter.

Bank Voor Handel concerned property which was vested during the German occupation of Holland and

in the *Orme* case the vesting order was issued while the claimants were resident within Germany. Petitioner does not dispute that property seized at the time of the owner's residence in enemy territory cannot be recovered in a 9(a) action. None of the cases which the court below cited are authority for the decision in *La Mola*, and certainly they offer no authority for its holding in the instant case that a person who acquires enemy status solely because of residence in enemy territory retains that status after a change of residence to non-enemy territory as to property not then vested.

II

The construction of the Act by the court below is a strained construction which is contrary to the common law and the Congressional intention as shown by the legislative history of the Act. At common law the cases are unanimous in holding that enemy status gained by residence in enemy territory ceases by a change of residence to non-enemy territory with respect to property not then seized. *The Indian Chief*, 3 C. Rob. 12 (Eng. 1801); *The Venus, supra; The Friendschaft*, (U.S.) 3 Wheat. 12 (1818); *United States* v. *Guillem*, (U.S.) 11 How. 47 (1850); *The Francis*, 1 Gall. 614, Fed. Cas. No. 5034 (1813), aff'd (U.S.) 8 Cranch 363; *Duguet* v. *Rhinelander*, 2 Johns. Cas. (N.Y.) 476 (1802).

It seems clear that the Congress intended that the definition of enemy contained in the Act would be within the common law rule. The House Report on the bill which became the Act (H. Rep. 85, 65th Cong. 1st Sess., June 21 (1917)) stated that:

> "The purpose of the bill is not to create new international rules or practices but to define and mitigate them."

If, then, no new rules were created, Congress intended to enact into the statute a definition of enemy which was no more severe than the international and common law rule. Both the Executive and Legislative Branches of the Government so understood and interpreted the Act, as is shown by a subsequent amendment to the Act. See *e.g.*, H. Comm. Hearings, 1920, Vol. 232-1, Point 8, quoted in *Swiss Nat. Ins. Co., supra*, p. 66. The exchange there between the Assistant to the Solicitor of the State Department and the Chairman of the House Foreign and Interstate Commerce Committee clearly shows that for the purpose of the Act enemy status was understood by both the Executive and Congress to mean *enemy status determined by the facts existing at the time of seizure.*

The court below did not even so much as mention the legislative history of the Act, but it did refer to the Joint Resolution of Congress of October 19, 1951.* That Resolution, however, has no relevance to the instant case because by its own terms it provided that nothing contained in it should alter the status as it existed immediately prior to its enactment, of Germany or of any person with respect to any property or interest. That Resolution was legislation requested by the Executive and it had two purposes—(1) to terminate the war with Germany and (2) by a "savings clause" to avoid the extinguishment of the existing vesting powers which otherwise would automatically result from the termination of the war. It was not intended to, and it did not, change the definition of enemy or alter the rules for confiscating property under the Act and the Government should not be heard to contend that it did.

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* 65 Stat. 451 (1951), 50 U.S.C. Appendix note preceding § 1 p. XX (1958).

III

The decision of the court below violates petitioner's protection under the Fifth Amendment against the taking of property without the payment of just compensation. As shown above, when petitioner abandoned her residence in Germany and assumed residence in neutral Switzerland, which she did five years prior to the vesting of her property, she was, at common law, a friendly alien. *Supra*, p. 8. Friendly aliens are entitled to the protection of the Fifth Amendment. *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481 (1931); *Silesian American Corp.* v. *Clark*, 332 U.S. 469, 479-484 (1947). This Court in *Guessefeldt* v. *McGrath*, *supra*, p. 318, said that construing the Act in such a way as to confiscate the property of a person who at common law *might* not be an enemy raised debatable constitutional questions which should be avoided. It would be otherwise if the Congress had clearly defined enemy to include persons not within the common law concept of "enemy"; then the constitutional question would have to be squarely faced. Here there is nothing to indicate that Congress intended to expand the common law concept of "enemy". Thus, as in *Guessefeldt* the Act should be construed to avoid rather than raise the constitutional problem.

The Act should be construed to preserve petitioner's constitutional rights in a 9(a) action without relegating her to the Court of Claims. *Clark* v. *Uebersee Finanz Korp., A.G.*, 332 U.S. 480, 487, 488 (1947).

IV

The court below based its opinion solely upon the decision in *La Mola*. At the time of the argument of the instant case, the *La Mola* decision had not come

down and petitioner had no opportunity to analyze it or argue it before the court. If the petition for *certiorari* is granted in *La Mola* it should be granted in the instant case in order to give petitioner her day in court and thus prevent a substantial injustice.

CONCLUSION

The court below erred in deciding the instant case contrary to the decision of the Third Circuit Court of Appeals in *Willenbrock*. It has construed the Act contrary to the common law and the Congressional intent. Moreover, it has decided a constitutional question which this Court has said should be avoided where possible. It has given the Act a strained construction which effects a confiscation. This Court has said:

> "Considering that confiscation is not easily to be assumed, a construction that avoids it and is not barred by a fair reading of the legislation is invited." *Guessefeldt* v. *McGrath*, *supra*, p. 319.

The only practical effect of the construction of the Act in *La Mola* as applied in the instant case is to permit the United States Government to profit by reducing the cost of the war to itself by taking the property of a person who has committed no hostile act against the United States, who some five years before her property was vested had severed her relations with the enemy state, and who, as a result has no recourse to it for compensation. A decision which requires such a strained construction of the Act to bring about such a harsh and unjust result should not be permitted by this Court to stand.

Wherefore petitioner prays that a writ of certiorari may issue.

Respectfully submitted,

JOHN W. PEHLE

JAMES H. MANN
1210 Eighteenth Street, N.W.
Washington 6, D. C.
Counsel for Petitioner

PEHLE, MANN, RIEMER & LUXFORD
1210 Eighteenth Street, N.W.
Washington 6, D. C.
Of Counsel.